

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**PANERA, LLC<sup>1</sup>**

**Employer**

**And**

**Case 13-RC-21314**

**BAKERY, CRACKER, PIE, YEAST DRIVERS  
& MISCELLANEOUS WORKERS UNION,  
LOCAL 734**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on March 23, 2005, before a hearing officer of the National Labor Relations Board, herein the Board, to determine an appropriate unit for collective bargaining.<sup>2</sup>

**I. Issues**

Bakery, Cracker, Pie, Yeast Drivers & Miscellaneous Workers Union Local 734, herein the Petitioner, seeks an election within a unit comprised of all full-time and regular part-time truck drivers employed by Panera, LLC, herein the Employer, at its facility located at 500 E. Touhy Avenue, Des Plaines, Illinois, including drivers receiving and delivering product from its facility located at 5900 W. John Deere Road, Moline, Illinois.<sup>3</sup>

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<sup>1</sup> The names of the parties appear as amended at hearing.

<sup>2</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

<sup>3</sup> The unit appears as amended at the hearing.

The issue to be decided by the Regional Director is whether the unit petitioned-for, is an appropriate unit under Section 9(b) of the Act. The Petitioner asserts that the petitioned-for unit of truck drivers is an appropriate unit. There are approximately 30 employees in the unit sought by the Petitioner. The Employer contends, however, that a unit of truck drivers is inappropriate because nine stagers and three checker/loaders share a distinct community of interest with the drivers such that they must be included in the unit.<sup>4</sup>

## **II. Decision**

Based on the entire record in this proceeding and for the reasons set forth below, I find that the unit as petitioned-for is an appropriate unit under Section 9(b) of the Act.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full-time and regular part-time truck drivers employed by the Employer at its facility located at 500 E. Touhy Avenue, Des Plaines, Illinois, including drivers receiving and delivering product from its facility located at 5900 W. John Deere Road, Moline, Illinois; but excluding all other employees, maintenance and production employees, facility managers, production managers, distribution managers, office clerical employees, guards, professional employees and supervisors as defined in the Act.

## **III. Statement of Facts**

The Employer is engaged in the business of selling food products from its bakery cafes. It operates a fresh dough facility located in Des Plaines, Illinois which produces and supplies dough products to nearly 100 cafes in the Chicagoland area. Ken Murray, the fresh dough facility manager, is responsible for overseeing the overall operation of this facility. The managerial hierarchy also includes Production Manager Moises Martinez and Distribution Manager Porfirio Naja. In addition, the facility employs, in relevant part, approximately 30 drivers, 9 stagers, and 3 checker/loaders.

The stagers work staggered shifts that begin between 5:00 p.m. and 3:00 a.m. and are responsible for transporting shaped raw dough products from the facility's production room to large coolers. After the dough products have been chilled to 42 degrees, the stagers stack sheet pans full of these products in transport cabinets in accordance with each bakery cafe's daily order. The checker/loaders, who arrive at either 3:00 a.m. or 5:00 a.m., then ensure that each cafe order has been properly filled before rolling the cabinets out to the docks to be loaded onto trucks. The stagers, on occasion, assist the checker/loaders in transporting the cabinets to the docks. During the course of their respective workdays, the stagers are supervised by Martinez and the checker/loaders are supervised by Naja.

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<sup>4</sup> At the hearing, the Employer further contended that its bakery cafe liaisons should be included in the unit. However, the Employer in its post-hearing brief now concedes that these employees should not be included in the unit.

The drivers work staggered shifts that begin between 5:30 a.m. and 12:00 p.m.<sup>5</sup> Their workday begins with a drive to a Penske facility where they pick up an empty truck (either a straight truck or tractor-trailer truck) which they drive back to the Employer's facility. Upon returning to the facility, the driver starts the truck's refrigeration unit to ensure that the dough products are maintained at a temperature below 45 degrees while in transit. The driver is provided with invoices that list the deliveries to be made to the various cafes that day. At this point the driver interacts with a checker/loader at the dock regarding the extent to which the latter will assist in loading the transport cabinets full of dough products onto the truck. About 1/3 of the drivers simply load the truck by themselves because of their desire to organize the deliveries in a particular way. But 1/3 of the drivers permit the checker/loader to assist them in loading the truck and another 1/3 of the drivers place the entire burden of loading the truck on the checker/loader. This difference in loading the trucks is attributable to the fact that the Employer has no set policy regarding this task. In any event, the checker/loaders spend about half their shift assisting various drivers with this task and the other half working alone in the cooler where they check that the cafes' orders have been filled accurately.<sup>6</sup>

After the truck has been loaded, it is the driver's sole responsibility to secure the cabinets with a load bar inside the truck. The driver then makes deliveries to about five or six different bakery cafes. The driver must unload the cabinets full of dough products and manually bring them into the cafe where they are checked by a cafe bakery liaison to ensure that the invoice comports with the actual delivery. It is also the driver's responsibility to take empty cabinets back to the truck and secure them. Due to the nature of the job, the drivers eat their lunch while on the route before returning to the Employer's facility.

Upon returning to the Employer's facility, the driver unloads the empty cabinets on the dock. The stager's transport the cabinets to the pan washing room and ultimately back to the cooler. The stager and driver may or may not interact during this time, but the total interaction between them constitutes, at most, 10 percent of the driver's workday. In fact, the drivers only spend 10 to 20 percent of their work day at the Employer's facility. Drivers must next return their trucks to the Penske facility to be refueled. Drivers are also required to complete a driver vehicle inspection report mandated by the Department of Transportation. This report identifies problems with the truck as well as any necessary repairs that must be performed. When all of these tasks have been completed, the drivers return to the Employer's facility and submit their invoices. Unlike the stagers and checker/loaders, the drivers' shift does not have a set ending time since they must work until all of their deliveries and related tasks have been completed. But all three of these job classifications punch in and out on the same timeclock. The drivers like the checker/loaders (but unlike the stagers) are supervised by Naja.

Finally, with respect to wages, benefits, and other conditions of employment, stagers and checker/loaders start at \$10 per hour and have their wage rate increased to \$11 per hour after 90 days of employment. Their wage rate range is between \$10 and \$13 per hour. The drivers start at \$14 per hour and have their wage rate increased to \$15 per hour after 90 days. Their current

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<sup>5</sup> It should be noted that two drivers named Sunday Keku and Martin Siebert receive and deliver product from the Employer's fresh dough facility in Moline, Illinois. The parties stipulated that these drivers should be included in the unit.

<sup>6</sup> The checker/loaders work from either 3:00 a.m. to 1:30 p.m. or 5:00 a.m. to 1:30 p.m.

wage rate range is between \$15 and \$20 per hour. But unlike the stagers and checker/loaders, the drivers do not have their wage rate capped by the Employer. Although these three job classifications also share the same employee handbook, only the drivers are required to maintain a Class A or B commercial driver's license, comply with the Department of Transportation's regulations, and are the only job classification subject to the Employer's disciplinary policy relating to traffic accidents and speeding tickets. Because the stagers and checker/loaders do not possess a commercial driver's license, there is no job interchange between them and the drivers. There is no evidence that a driver has ever been promoted from either the stagers or checker/loader job classifications. The stagers and checker/loaders are required to wear white uniforms and hairnets because they handle food products in the cooler. Drivers, on the other hand, wear black uniforms and only wear hairnets while loading their trucks. The stagers and checker/loaders eat their lunch and take their breaks in the Employer's breakroom which is shared by all employees whereas the drivers eat their lunch on their routes. All the employees at Employer's DesPlaines facility, including the drivers, checker/loaders, and stagers, share many of the same benefits such as health insurance, dental insurance, 401(k) plan, stock purchase program, and vacation days.

#### **IV. Analysis**

Section 9(b) of the Act grants discretion to the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). The Board's procedure for determining an appropriate unit is to first examine the petitioned-for unit. *See, e.g., The Boeing Company*, 337 NLRB 152, 153 (2001); *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). If the petitioned-for unit is appropriate, then the inquiry ends; if the petitioned for unit is not appropriate, the Board may examine alternative units suggested by the parties or select an appropriate unit different from those proposals. *Id.* It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. *Id.*; *see also Phoenix Resort Corp.*, 308 NLRB 826, 827 (1992). A unit is appropriate where employees in the unit have a separate community of interest from other job classifications; in determining this community of interest, the Board examines such factors as wages, hours and working conditions, commonality of supervision, degree of skill and common functions, frequency of contact and interchange with other employees, and functional integration. *Boeing Co.*, 337 NLRB at 153. However, no one factor has controlling weight. *Airco, Inc.*, 273 NLRB 348 (1984).

Upon the record evidence in this case, I find that the truck drivers share a sufficiently distinct and separate community of interest from the stagers and checker/loaders to constitute an appropriate unit without their inclusion. More specifically, the evidence establishes that the drivers, who are responsible for delivering dough products to bakery cafes, perform a different job function using different skills than the job functions and skills of stagers and checker/loaders. The drivers must meet job requirements different from the stagers and checker/loaders in obtaining a commercial driver's license and are subject to rules and regulations of the Employer that the stagers and checker/loaders are not subject to. The drivers spend most of their work day out of the facility where the stagers and checker/loaders exclusively work in, resulting in minimal contact between the drivers and the stagers and checker/loaders. While the checker/loaders do assist some drivers with the loading of their trucks, the evidence shows that in

2/3 of the instances they do not work side-by-side.<sup>7</sup> In the case of the stagers, the lack of contact with the drivers is even more pronounced. Because the drivers possess different skills as well as a commercial driver's license, there is no interchange between them and the other two job classifications, and there is no evidence that a driver has ever been promoted from one of the other two job classifications. Even though all three job classifications utilize the same timeclock, the drivers work different hours than the other two job classifications – especially at it relates to the stagers. Indeed, the drivers are the only classification that does not have a set ending time due to the nature of their work. The drivers wear different uniforms than the two other job classifications. More importantly, the drivers are paid significantly higher wages than the stagers and checker/loaders and are not subject to the wage rate cap that the stagers and checker/loaders are subject to. Although all three job classifications share common benefits, some common work policies, and in the case of the checker/loaders common supervision, I find that these factors alone do not outweigh the other factors which point to the drivers' separate and distinct community of interest.

Contrary to the Employer's assertions, I further find that the stagers and checker/loaders are not integrated with the drivers to such an extent that their exclusion would make the petitioned-for unit inappropriate. The Employer's cases in this regard are distinguishable. Three cases cited by the Employer, *Overnight Transportation Co.*, 325 NLRB 612 (1998), *Institutional Food Services*, 258 NLRB 650 (1981), and *Mayflower Contract Services, Inc., v. NLRB*, 142 LRRM 2272 (8<sup>th</sup> Cir, 1992) (as cited by the Employer) all involve units where the petitioner sought broader units that included drivers and other employees. Thus, those cases did not address whether drivers only units would be appropriate. The fact that a larger unit, if sought, may also be appropriate does not mean that a less comprehensive grouping of employees is inappropriate. As set forth above, the appropriate inquiry is whether the petitioned for unit is appropriate under the community of interest standards. If it is, as I have found, the inquiry ends even if a more comprehensive grouping of employees is also appropriate. It is well established that where the petitioning labor organization is the only union involved in the proceeding, "it is irrelevant that some other larger or smaller unit might also be appropriate, or indeed might be the most appropriate." *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037 (1967). In its brief the Employer relies primarily on the Board's decision in *Boston Medical Laboratory, Inc.*, 235 NLRB 1271 (1978), in which the Board found that a petitioned-for unit of drivers was inappropriate. However, that case is factually distinguishable from the instant situation. In *Boston Medical Laboratory* the Board found substantial evidence of functional integration between the drivers and other employees, including frequent contacts and overlapping job functions and responsibilities. In reaching this decision, the Board cited the fact that nearly half the drivers regularly performed custodial and stockroom work. *Id.* at 1272. In contrast to the drivers in the cited case, the Employer's drivers as set forth above do not enjoy frequent contacts with the stagers and checker/loaders, perform similar job functions, or otherwise share the degree of contact and interchange found in *Boston Medical Laboratory*. Accordingly, I find that the unit as petitioned-for constitutes an appropriate unit under Section 9(b) of the Act and direct an election in that unit.

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<sup>7</sup> In 1/3 of the instances, the driver loads the truck by himself and in another 1/3 of the instances the checker/loader loads the truck without any assistance from the driver. Thus, in only 1/3 of the instances do the drivers and checker/loaders work side by side.

## **V. Summary**

Based on the foregoing and the entire record herein, I find that the unit as petitioned-for is an appropriate unit consisting all full-time and regular part-time truck drivers employed by the Employer at its facility located at 500 E. Touhy Avenue, Des Plaines, Illinois, including drivers receiving and delivering product from its facility located at 5900 W. John Deere Road, Moline, Illinois.

## **VI. Direction of Election**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

## **VII. Notices of Election**

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## **VIII. List of Voters**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior*



*Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois, 60606 on or before **April 14, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

**IX. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **April 21, 2005**.

DATED at Chicago, Illinois this 7<sup>th</sup> day of April 2005.

/s/Roberto G. Chavarry

Regional Director  
National Labor Relations Board  
Region 13  
200 West Adams Street, Suite 800  
Chicago, Illinois 60606

440-1760-6200  
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